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No. 88-399

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLIE HAMMOND, PETITIONER

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act provides a railroad employee with a cause of action for a purely emotional injury.

2. Whether the Railway Labor Act preempts a common law cause of action for a purely emotional injury.

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INTRODUCTION

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, a railroad switchman, seeks recovery from his employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, and the common law for emotional injuries that he allegedly sustained in the course of his employment. The court of appeals affirmed a district court judgment holding that the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, provides the sole remedy for petitioner's alleged injury.

1. a. Congress enacted the FELA to provide a federal remedy for railroad workers employed in interstate commerce who suffer personal injuries as a result of the negligence of their employers or their fellow employees. See generally *Atchison, T. & S.F.R.R.* v. *Buell,* 480 U.S. 557, 561-562 (1987). Section 1 provides:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in [interstate] commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. 51. A plaintiff may file his FELA suit in either federal or state court. 45 U.S.C. 56. If a plaintiff elects to file in state court, the defendant cannot remove the suit to a federal forum. 28 U.S.C. 1445(a).[1]

"The coverage of the [FELA] is defined in broad language, which has been construed even more broadly." *Buell,* 480 U.S. at 561-562 (footnotes omitted). The FELA eliminates a number of traditional tort liability defenses (such as the common law's "fellow servant" rule) and expressly nullifies any attempt by a carrier, through contractual agreement or otherwise, to deprive its employees of their statutory remedy. 45 U.S.C. 55. This Court has held that causation may be established by proofs showing that "employer negligence played any part, even the slightest,

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[1] Section 1445(a) provides:

> A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. 1445(a).

in producing the injury or death for which damages are sought" (*Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)), and it has construed the FELA's remedy to reach some kinds of intentional torts (*Jamison* v. *Encarnacion*, 281 U.S. 635, 641 (1930)). See *Buell*, 480 U.S. at 562 n.8. This Court has also held that the FELA remedy generally supersedes state laws that otherwise would determine an interstate carrier's liability for an employee's workplace injury. See *Erie R.R.* v. *Winfield*, 244 U.S. 170 (1917); *New York Cent. R.R.* v. *Winfield*, 244 U.S. 147 (1917).

b. Congress enacted the RLA to provide a collective bargaining and arbitration mechanism for avoiding and resolving disputes between management and labor that may lead to interruption of interstate commerce. See 45 U.S.C. 151a. The Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First). The Act provides distinct procedures for resolving so-called "major" and "minor" disputes.

Major disputes involve "the formation of collective agreements or efforts to secure them." See *Elgin, J. & E.R.R.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). When a major dispute occurs, the parties must preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156) while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. See *Detroit & T.S.L. R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969).[2]

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[2] If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second

Minor disputes, by contrast, generally involve "the meaning or proper application" of a particular collective bargaining agreement. See *Elgin*, 325 U.S. at 723. Unlike a major dispute, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards" for mandatory arbitration. 45 U.S.C. 153 First (i), Second.[3]

c. This Court addressed the interrelationship of the FELA and the RLA in *Atchison, T. & S.F.R.R.* v. *Buell*, *supra*. In that case, a railroad carman sued his employer under the FELA, alleging that the railroad's failure to provide him with a safe place to work had caused him severe emotional injury. See 480 U.S. at 559-560. The railroad responded that the RLA's "minor" dispute mechanism, which requires binding arbitration, provided the carman with an exclusive remedy (*id.* at 560). The Court rejected the railroad's argument, stating (*id.* at 564):

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages.

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and Seventh, 155 First, 156, 157, 160. See also *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444 n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[3] In such circumstances, the adjustment board's arbitration decision is binding on the parties (45 U.S.C. 153 First (m), Second), and judicial review is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with the RLA's specific statutory requirements, or was influenced by fraud or corruption (45 U.S.C. 153 First (q), Second). See *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam).

The Court added (*id.* at 567): "Although we do not decide today whether purely emotional injuries are cognizable under the FELA, we stress that it is the FELA that controls that inquiry, not the RLA."

2. a. Petitioner filed this action against respondent on December 27, 1985, in the Illinois Circuit Court for the Third Judicial District (Madison County). His complaint,[4] which stated that petitioner's and respondent's "rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act" (Add., *infra,* 2a), alleged that respondent had filed "inappropriate" and "unwarranted" disciplinary charges against petitioner "for the purpose of causing harassment and emotional stress," which resulted in petitioner's hospitalization and inability to work (*ibid.*). See Pet. App. A1, A8.

Respondent removed petitioner's action to the United States District Court for the Southern District of Illinois and moved for dismissal, contending that petitioner's allegations constituted an RLA minor dispute that was subject to mandatory arbitration. Petitioner requested the federal district court to remand the action to the state forum, and he filed an amended complaint in federal court that set forth his FELA claim with greater particularity and that added a state law claim (see Add., *infra,* 4a-10a). Shortly before this Court issued its decision in *Buell,* the federal district court denied petitioner's motion to remand and granted respondent's motion to dismiss. Pet. App. A8-A11. The court concluded, on the basis of the allegations contained in the original complaint, that the petitioner's FELA claim was "inextricably intertwined" with the RLA bargaining process, that the RLA "therefore preempt[ed]" petitioner's FELA claim, and that removal ac-

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[4] We have reproduced petitioner's complaint and his first amended complaint as addenda to this brief.

cordingly was proper (Pet. App. A10-A11). The court further concluded that petitioner's claim raised a minor dispute subject to mandatory arbitration (*id.* at A11). See *id.* at A1-A2.

b. The court of appeals affirmed the district court's dismissal. Pet. App. A1-A6. The appellate court recognized that "the anterior question is whether the suit was properly removed" (*id.* at A2). It observed that 28 U.S.C. 1445(a) prohibits removal of claims "arising under" the FELA (see note 1, *supra*) and that there is "no way around the stark imperative of section 1445(a) unless it is apparent from the pleadings that the suit arises under the [RLA] rather than the FELA, so that in effect the complaint is mislabeled" (*id.* at A3). The court concluded that petitioner's state court complaint was, in fact, mislabeled (*id.* at A4). In the court of appeals' view (*ibid.*):

> That pleading complained only about the railway's having filed allegedly unmeritorious disciplinary charges; it was a pure breach of contract claim, like a claim for having been fired without just cause; and the contract is the collective bargaining agreement.

The court of appeals accordingly held that "the district court could not be faulted for denying the motion to remand the case to state court" (*ibid.*).

The court of appeals then addressed the district court's dismissal of the action. It acknowledged that *Buell* undermined the district court's conclusion that the RLA preempts an otherwise valid FELA claim, but it concluded that petitioner's action nevertheless was subject to dismissal (Pet. App. A2-A6). In the court of appeals' words (*id.* at A2):

> A suit that states a claim under the FELA * * * cannot be thrown out on the ground that it is really a minor dispute under the RLA. It can, of course, be

> thrown out on the ground that it does not state a claim under the FELA, and in *Lancaster v. Norfolk & W. R[.R.]*, 773 F.2d 807, 813 (7th Cir. 1985), we held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact."

The court concluded that even "[t]he *amended* complaint, filed in the district court after the denial of the motion to remand, stated no claim under the FELA as interpreted in *Lancaster*" (*id.* at A4). The amended complaint "was not frivolous, but it was clearly barred by *Lancaster* and therefore properly dismissed" (*id.* at A6).[5]

DISCUSSION

Petitioner contends that this case provides an appropriate opportunity for the Court to consider: (1) whether the FELA provides a railroad employee with a cause of action for a purely emotional injury (Pet. 6-11); and (2) whether the RLA preempts common law remedies for emotional injury (Pet. 11-16). The first question, which this Court left unresolved in *Atchison, T. & S.F. R.R.* v. *Buell, supra,* may ultimately warrant this Court's review. We nevertheless submit that this petition for a writ of certiorari should be denied. In our view, the court of appeals erred in upholding the removal of petitioner's action from

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[5] The court of appeals observed that petitioner's amended complaint "could not be thought frivolous, since the Ninth Circuit explicitly disagrees with *Lancaster* (see *Lewey* v. *Southern Pacific Transportation Co.*, 799 F.2d 1281, 1288 (9th Cir. 1986) (citing cases)), the Fifth Circuit disagrees implicitly (see *Yawn* v. *Southern Ry.*, [591 F.2d 312, 316-317 (5th Cir. 1979)]), and the Supreme Court reserved the issue in *Buell* (see 107 S.Ct. 1417-1418)." Pet. App. A4. The court of appeals considered petitioner's original complaint frivolous, however, because that complaint failed to allege that petitioner's injuries arose from unsafe working conditions. See *id.* at A5.

a state to a federal forum. That procedural misstep permitted the court to reach the merits of petitioner's claims, which it resolved summarily based on its pre-*Buell* precedent. As a result of this series of events, the record here is scant and—as was the case in *Buell* (480 U.S. at 568-571)—is not sufficiently developed to permit careful analysis of the question.

1. The court of appeals recognized that Section 1445(a) prohibits removal of actions "arising under" the FELA. See Pet. App. A3-A4. The court nevertheless found removal appropriate here on the theory that, although petitioner attempted to invoke the FELA, his original pleading "was a pure breach of contract claim" (*id.* at A4). We disagree with that characterization of petitioner's complaint.

As a general rule, "the party who brings a suit is master to decide what law he will rely upon * * *." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). The allegations contained in his complaint "determine whether he will bring a 'suit arising under' " (*ibid.*) a particular federal law. There can be no doubt in the instant case that petitioner's state court action was intended to invoke the FELA's remedial scheme. His original complaint unambiguously stated that the employer's and employee's "mutual and respective rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act" (Add., *infra*, 2a).

While it undoubtedly is true that a claim "does not arise under the FELA merely because the plaintiff names that statute in his complaint" (Pet. App. A3), petitioner here did more than simply cite the FELA. Petitioner's complaint stated a cause of action that—while tersely described—bore the characteristics of an FELA claim rather than a contractual dispute. Petitioner alleged that respondent intentionally took certain disciplinary actions

against him "for the purpose of causing harassment and emotional stress" (Add., *infra,* 2a), that respondent's actions "caused" petitioner "deep depression and agitation" (*ibid.*), and that, as a result, petitioner "has been hospitalized and has been unable to perform his job duties" (*ibid.*). Petitioner's claim thus states, albeit in rather rudimentary form, an FELA analog for the common law claim of intentional infliction of emotional distress. See *Buell,* 480 U.S. at 568 (noting that FELA jurisprudence gleans guidance from common law developments); compare Restatement (Second) of Torts § 46 (1965) (describing the tort of intentional infliction of emotional distress).[6]

Petitioner's original complaint could have been stated with greater detail and precision. But the complaint was adequate to give respondent "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (*Conley* v. *Gibson,* 355 U.S. 41, 47 (1957)), and it appeared to satisfy the requirements of Illinois law.[7] It may well be

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[6] The court of appeals' conclusion that petitioner's complaint stated "a pure breach of contract claim" (Pet. App. A4) is somewhat startling. First, the complaint *nowhere* alleges that the employer is subject to contractual duties or that the employer breached those duties. See Add., *infra,* 1a-3a. Second, the RLA's "minor dispute" provisions, which require mandatory arbitration of contract disputes, would *prohibit* petitioner from bringing a breach of contract action. See pages 3-4 & n.3, *supra.* Thus, the court of appeals construed a complaint that made no mention of a contract or its breach as stating an impermissible breach of contract claim.

[7] Under Illinois law, "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." Ill. Ann. Stat. ch. 110, para. 2-612(b) (Smith-Hurd 1983). Illinois law further provides that if "any pleading is insufficient in substance or form the court may order a fuller or more particular statement." Ill. Ann. Stat. ch. 110, para. 2-612(a) (Smith-Hurd 1983).

that the FELA ultimately would not provide a remedy in the circumstances alleged. But that issue goes to the merits of petitioner's FELA claim, and not to the question of removal. Section 1445(a)'s bar on removal of FELA actions cannot be overcome by a removal petition challenging the merits of the suit. See *Great Northern R.R.* v. *Alexander,* 246 U.S. 276, 281-282 (1918); *Southern R.R.* v. *Lloyd,* 239 U.S. 496, 500 (1916); cf. *The Fair,* 228 U.S. at 25 ("if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad").[8]

We accordingly submit that the lower courts erred in permitting removal of petitioner's FELA action. Since petitioner has not sought correction of that error in this Court, he has presumably waived any objection to removal—a waiver we believe he may properly make. See *Lirette* v. *N.L. Sperry Sun, Inc.,* 820 F.2d 116, 117 (5th Cir. 1987) (en banc).[9] But that error, which resulted in an

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[8] The court of appeals' suggestion that petitioner's original complaint was frivolous (Pet. App. A5) is unconvincing. This Court left open in *Buell* the question whether, and under what circumstances, the FELA would provide a remedy for "wholly mental injury" (480 U.S. at 567). As the Court noted, the question may well turn on analogies to developing state common law, which manifests widely divergent approaches with respect to "the degree of intent required to establish liability, and the level of physical manifestation of the emotional injury required to support recovery" (*id.* at 568-569, footnotes omitted). Under these circumstances, petitioner's complaint should not be deemed frivolous on the mere ground that it failed to allege "unsafe working conditions" (Pet. App. A5).

[9] The Section 1445(a) limitation was first enacted as part of the FELA (Act of Apr. 5, 1910, ch. 143, 36 Stat. 291) and was subsequently codified in Title 28. The Fifth Circuit originally held that Section 1445(a) was a non-waivable jurisdictional provision, see *Gamble* v. *Central of Ga. R.R.,* 486 F.2d 781, 785 (1973), but later overruled that decision in *Lirette.* In holding that a plaintiff could waive Section

unnecessary discussion of the merits, nevertheless affects the present posture of this case. Here, as in *Buell,* the court of appeals engaged in a resolution of the merits of the claim on a record that "has never been developed on the exact nature of the allegedly tortious activity, or the extent of the injuries that [petitioner] claims to have suffered" (*Buell,* 480 U.S. at 567).

2. As this Court explained in *Buell,* "whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case" (480 U.S. at 568). Instead, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity" (*ibid.*). Thus, "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand" (*id.* at 570).

Here, as much as in *Buell,* this Court cannot "know what all those facts are in this case" (480 U.S. at 570). The lower courts decided petitioner's suit based solely on petitioner's original and amended complaint. Thus, the Court "cannot begin to decide whether [petitioner] will be able to support his allegation that [respondent is] liable to him under the FELA" (*ibid.*). The lack of an adequate record—here, as in *Buell*—would pose a substantial, if not insurmountable, obstacle if this Court were to attempt to resolve the question whether the FELA permits recovery for emotional injury.[10]

1445(a)'s prohibition on removal (820 F.2d at 117), the court of appeals relied on *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972).

[10] We agree with respondent that the decision below does not squarely conflict with the holding of any other court of appeals. The

3. Neither the court of appeals nor the district court explicitly addressed petitioner's second question—whether the RLA preempts a common law suit for emotional injury. It is not clear whether petitioner, who relies alternately on "federal common law" (Pet. i (Questions Presented)) and "Illinois common law" (*id.* at 11), adequately presented that question below. We would expect, in any event, that the relevant inquiry would also include the question whether the *FELA*—which is concerned with personal injury—preempts petitioner's common law tort claim. See *New York Cent. R.R.* v. *Winfield,* 244 U.S. 147 (1917). Obviously, the FELA's preemptive effect may turn on the scope of the FELA remedy. Assuming that petitioner's second question is a matter in issue and was properly preserved below, the record here, as in the case of the first question presented, is inadequate to allow this Court a meaningful opportunity to address that question in all its aspects.

We accordingly conclude that the case does not provide an appropriate opportunity to resolve the issue that this Court left open in *Buell,* nor does it present any other issue warranting this Court's review.

Ninth Circuit's decision in *Buell,* 771 F.2d 1320, 1321, 1324 (1985), was vacated by this Court (480 U.S. at 571) and other decisions cited by petitioner appear distinguishable on their facts. The reasoning of the court below, however, is at odds with the reasoning of the Ninth Circuit in *Buell* and other cases, and its holding may be in conflict with that of the California Supreme Court in *McMillan* v. *Western Pac. R.R.,* 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d 449 (1960). But all these decisions were pre-*Buell,* and this Court's approach in *Buell* strongly suggests the desirability of awaiting a case with a fully developed record.

CONCLUSION

The petition for a writ of certiorari should be denied.[11]
Respectfully submitted.

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JANUARY 1989

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[11] The court of appeals may well have erred in resolving this case on the basis of its pre-*Buell* decision in *Lancaster* v. *Norfolk & W.R.R.*, 773 F.2d 807 (7th Cir. 1985) (see page 7, *supra*), rather than following this Court's example in *Buell* and remanding the case for further factual development. Though this Court may wish to consider summary reversal on that ground, we do not believe such a case-specific error is an appropriate basis for plenary review.

ADDENDUM A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 87-L-1775

BILLIE HAMMOND, PLAINTIFF

VS.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, DEFENDANT

[Filed Dec. 27, 1985]

COMPLAINT

Comes now the plaintiff, BILLIE HAMMOND, by and through his undersigned attorneys, KASSLY, BONE, BECKER, DIX & TILLERY, P.C., and for his Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, states as follows:

1. That the defendant, Terminal Railroad Association of St. Louis, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Illinois.

2. That the plaintiff, BILLIE HAMMOND, at all times mentioned herein was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and was at all times mentioned herein working as a switchman for the

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS in connection with railroad cars moved by it in interstate commerce.

3. That the plaintiff, BILLIE HAMMOND, and the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, were at said time in place and employed and engaged in interstate commerce, and by reason thereof, their mutual and respective rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act, 45 U.S.C. § 51 et al.

4. That on or about August 12, 1985, the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, through its employees and agents, formally charged the plaintiff with a violation of his job duties.

5. That on or about August 21, 1985, the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, formally charged the plaintiff with unnecessary delays in his job performance.

6. That both of the above stated formal charges processed by the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, against the plaintiff were done so inappropriately and for the purpose of causing harassment and emotional stress directed toward the plaintiff.

7. That the plaintiff has experienced deep depression and agitation that was caused in whole or in part from stress of his employment and the above stated inappropriate and unwarranted formal charges by the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

8. That as a result of his depression and emotional disorders, the plaintiff has been hospitalized and has been unable to perform his job duties with the defendant. The plaintiff has incurred medical expenses and lost income as a result of his illness, and the plaintiff will incur medical expenses and lost income in the future. The plaintiff has also experienced great emotional mental anguish as a result of his illness.

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in an amount reasonable and equitable and in excess of the amount necessary to confer jurisdiction upon the Circuit Judge Division of this court, plus costs of suit.

PLAINTIFF DEMANDS TRIAL BY JURY

KASSLY, BONE, BECKER,
DIX & TILLERY, P.C.

By /s/ Stephen M. Tillery
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ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 86-5038

BILLIE HAMMOND, PLAINTIFF

VS.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION, DEFENDANT

[Filed Nov. 19, 1986]

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff, BILLIE HAMMOND, by and through his attorney, *STEPHEN M. TILLERY, and leave of Court having first been obtained to amend his Complaint* against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *a corporation*, states as follows:

COUNT I

For Count I of his First Amended Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, the plaintiff states as follows:

1. That the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Il-

linois, *with its principal place of business in the State of Illinois.*

2. That the plaintiff, BILLIE HAMMOND, at all times mentioned herein, was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and was at all times mentioned herein working as a switchman for the TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS in connection with railroad cars moved by it in interstate commerce.

3. *That the jurisdiction of this Court is based upon an Act of Congress of the United States known as the Federal Employer's Liability Act, 45 U.S.C. Section 51, et. seq.*

4. *That during August of 1985, supervisors of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, intentionally harassed the plaintiff through use of the following practices:*

(a) *Repeatedly and severely criticized plaintiff for allegedly spotting cars in the wrong location on industry tracks while plaintiff was under charges for such alleged improper spotting, and while he was under written notice that he was to attend a formal investigation into this matter where he could reasonably foresee an assessment of discipline;*

(b) *Setting wildly unrealistic time estimates for tasks assigned to plaintiff and wearing him out physically and mentally thereby;*

(c) *Keeping an extraordinarily close watch on plaintiff's work and following him from work assignment to work assignment;*

(d) *Inducing plaintiff to sign a waiver of his right to a formal investigation into the alleged improper spotting of cars on industry tracks, and accepting a discipline of reprimand under the threat that if he did not sign for such a repri-*

mand waiving his right to formal investigation, that he would be subject to loss of his rights to work as a switching foreman, and suffer actual suspension; and further, promising plaintiff that the entire discipline matter would be resolved and ended by his signing said waiver. That the defendant made this promise to plaintiff that it would end the discipline proceedings against him with the full knowledge that at the time the plaintiff signed said waiver, it was in the process of issuing an additional series of written charges against plaintiff, continuing the discipline proceedings against him;

(e) *Issuing, in fact, the additional series of written charges against plaintiff continuing the discipline proceedings against him;*

(f) *Arbitrarily denying plaintiff the right to "mark off" from work on Sunday, August 26, 1985, thereby requiring plaintiff to remain working irregular hours as a switchman assigned to the switchman's extra board seven (7) days a week without prospect of time off from work to obtain relief from the supervisory harassment;*

(g) *Holding a discipline hearing on the additional series of written charges against plaintiff, and continuing the discipline proceedings against plaintiff during plaintiff's absence due to his medical and psychiatric treatment and care.*

5. *That the conduct of the defendant's supervisors hereinabove, exceeded the bounds of socially tolerable employer practices.*

6. *That the defendant,* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *by and through its officers and ex-*

ecutives, negligently and carelessly committed one or more of the following acts or omissions of negligence:

(a) *Failed to provide the plaintiff with a reasonably safe place to work free of intentional supervisory harassment;*

(b) *Failed to hire competent supervisory personnel;*

(c) *Failed to properly train and instruct supervisory personnel in the performance of their duties;*

(d) *Failed to adequately monitor the supervisory personnel in the performance of their duties.*

7. *That as a result of the defendant's conduct, the plaintiff has suffered severe and permanent emotional disorder, depression, mental distress, anguish, and nervous tension, requiring hospitalization and medical care. The plaintiff has been unable to perform his job duties with the defendant, and will continue to be unable to perform his job duties. Plaintiff has incurred medical expenses and lost income as a result of his psychiatric injury, and he will incur medical expenses and lost income in the future.*

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in amount reasonable and equitable, and in excess *of that amount necessary to confer jurisdiction upon this Court.*

PLAINTIFF DEMANDS TRIAL BY JURY ON COUNT I

COUNT II

For Count II of his First Amended Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, the plaintiff states as follows:

1. *That the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Illinois, with its principal place of business in the State of Illinois.*

2. *That the plaintiff, BILLIE HAMMOND, at all times mentioned herein, was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and had been an employee of the defendant, for approximately thirty (30) years.*

3. *That during August of 1985, supervisors of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, intentionally harassed the plaintiff through use of the following practices:*

(a) *Repeatedly and severely criticized plaintiff for allegedly spotting cars in the wrong location on industry tracks while plaintiff was under charges for such alleged improper spotting, and while he was under written notice that he was to attend a formal investigation into this matter where he could reasonably foresee an assessment of discipline;*

(b) *Setting wildly unrealistic time estimates for tasks assigned to plaintiff and wearing him out physically and mentally thereby;*

(c) *Keeping an extraordinary close watch on plaintiff's work and following him from work assignment to work assignment;*

(d) *Inducing plaintiff to sign a waiver of his right to a formal investigation into the alleged improper spotting of cars on industry tracks, and accepting a discipline of reprimand under the*

threat that if he did not sign for such a reprimand waiving his right to formal investigation, that he would be subject to loss of his rights to work as a switching foreman, and suffer actual suspension; and further, promising plaintiff that the entire discipline matter would be resolved and ended by his signing said waiver. That the defendant made this promise to plaintiff that it would end the discipline proceedings against him with the full knowledge that at the time the plaintiff signed said waiver, it was in the process of issuing an additional series of written charges against plaintiff, continuing the discipline proceedings against him;

(e) *Issuing, in fact, the additional series of written charges against plaintiff continuing the discipline proceedings against him;*

(f) *Arbitrarily denying plaintiff the right to "mark off" from work on Sunday, August 26, 1985, thereby requiring plaintiff to remain working irregular hours as a switchman assigned to the switchman's extra board seven (7) days a week without prospect of time off from work to obtain relief from the supervisory harassment;*

(g) *Holding a discipline hearing on the additional series of written charges against plaintiff, and continuing the discipline proceedings against plaintiff during plaintiff's absence due to his medical and psychiatric treatment and care.*

4. *That the conduct of defendant's supervisors hereinabove described was outrageous, and was intentionally, willfully and maliciously done for the sole purpose of inflicting severe emotional distress on the plaintiff.*

5. That defendant's supervisors were acting while in the course of their employment, and that such acts were permitted, allowed, ratified and encouraged by defendant's officers and executives.

6. That as a result of the defendant's conduct, the plaintiff has suffered severe and permanent emotional disorder, depression, mental distress, anguish, and nervous tension, requiring hospitalization and medical care. The plaintiff has been unable to perform his job duties with the defendant, and will continue to be unable to perform his job duties. Plaintiff has incurred medical expenses and lost income as a result of his psychiatric injury, and he will incur medical expenses and lost income in the future.

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in amount reasonable and equitable, and in excess of that amount necessary to confer jurisdiction upon this Court.

PLAINTIFF DEMANDS TRIAL BY JURY ON COUNT II

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